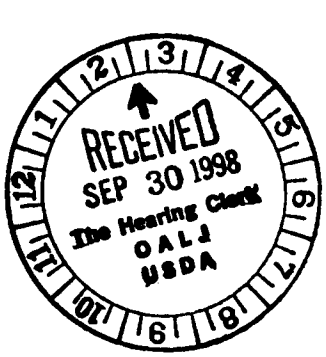

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-97-0004
	)	
Western Sierra Packers, Inc.,	)	
	)	
Respondent	)	**Decision and Order**

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 16, 1996.

The Complaint alleges that: (1) from approximately October 26, 1995, through November 3, 1995, Western Sierra Packers, Inc. [hereinafter Respondent], misrepresented the character or kind of 2,529 cartons of grapefruit that it packed and/or sold to two customers in the course of interstate or foreign commerce by designating the grapefruit hybrid as the Oroblanco variety, when the grapefruit was the Melogold variety (Compl. ¶ III); (2) Respondent made false and misleading statements, for a fraudulent purpose, in connection with the misbranded grapefruit (Compl. ¶ IV); and (3)

Respondent failed to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business in connection with the misbranded grapefruit (Compl. ¶ V). Respondent filed Answer and Request for Hearing [hereinafter Answer] on February 7, 1997, denying the material allegations of the Complaint and raising seven affirmative defenses.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on December 2 through December 4, 1997, in Fresno, California. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Fred V. Spallina, Esq., Spallina & Krause, Porterville, California, represented Respondent.

On March 6, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order; on April 8, 1998, Respondent filed Trial Brief of Respondent Western Sierra Packers, Inc; and on May 1, 1998, Complainant filed Complainant's Reply Brief.

On May 19, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent failed to keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i); (2) concluded that Respondent did not make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluded that Respondent did not misrepresent any

perishable agricultural commodity in interstate or foreign commerce, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)); and (4) ordered the publication of the facts and circumstances of Respondent's violation of section 9 of the PACA (7 U.S.C. § 499i) (Initial Decision and Order at 2, 8-9, 16).

On June 19, 1998, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On July 10, 1998, Respondent filed Response Brief of Respondent Western Sierra Packers, Inc. [hereinafter Respondent's Response], and on July 13, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the Chief ALJ that Respondent violated section 9 of the PACA (7 U.S.C. § 499i) and that Respondent did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I disagree with the Chief ALJ's conclusion that Respondent did not violate section 2(5) of the PACA (7 U.S.C. § 499b(5)) and the sanction imposed by the Chief ALJ. Therefore, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Complainant's exhibits are designated by the letters "CX," Respondent's exhibits are designated by the letters "RX," and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in

interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

> (A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or
>
> (B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

§ 499i. Accounts, records, and memoranda; duty of licensees to keep; contents; suspension of license for violation of duty

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

7 U.S.C. §§ 499b(4)-(5), 499i (1994 & Supp. II 1996).

Findings of Fact

1. Respondent, Western Sierra Packers, Inc., is a corporation whose business address is 23590 95th Avenue, Terra Bella, California 93270 (CX 1).

2. Respondent was issued PACA license number 911063 on May 8, 1991, and Respondent is, and at all times material to the Complaint was, licensed under the PACA (CX 1).

3. Respondent is owned jointly by John Guidetti and Craig Nieblas. Mr. Nieblas is also the founder, president, and general manager of Respondent (CX 1; Tr. 367-68).

4. Respondent is a specialty packing house that handles subtropical citrus fruit. Respondent employs contractors to pick fruit for growers, Respondent packs the fruit, and Respondent charges growers fees for packing, state standardization, citrus research assessment, selling, picking, and hauling. (CX 10, CX 11; Tr. 397-98.)

5. Beginning in 1993, Respondent began using a sales agent, Heritage Produce Sales, Inc., to sell the fruit of some of the Respondent's growers (Tr. 400-01). When Heritage Produce Sales, Inc., sold Respondent's growers' fruit, Heritage Produce Sales, Inc., would transmit a copy of the purchase order to Respondent, and Respondent would then ship the fruit based on the purchase order. Heritage Produce Sales, Inc., would then send an invoice to the buyer of the fruit, and after Heritage Produce Sales, Inc., was paid by the buyer, Heritage Produce Sales, Inc., would pay Respondent and send Respondent a copy of the invoice. (Tr. 152-53.) For some of Respondent's growers, Respondent does not use a sales agent, but instead packs the growers' fruit, sells the fruit, collects payment for the fruit, and remits the amounts collected, minus Respondent's charges for packing, to the growers. Respondent refers to these growers as Western Sierra growers. (Tr. 401.)

6. Respondent maintains growers files in which Respondent keeps records of the fruit picked, records of the fruit that Respondent receives, and records of the fruit that Respondent packs. Respondent maintains growers files for Sierra Victor Ranch Company, Sequoia Enterprises, Inc., and Western Sierra growers. Respondent maintains a separate accounts receivable file in which it keeps all of its invoices. (Tr. 78.)

7. During the 1995-1996 growing season, Respondent contracted with drivers to bring fruit from the growers' fields to Respondent's packing house. When the drivers brought the fruit to Respondent for packing, Respondent issued a receiving ticket, indicating the quantity and type of fruit received. One copy of the receiving ticket would be given to the driver, a copy of the receiving ticket would be attached to the appropriate grower's file, and a third copy of the receiving ticket would be filed with Respondent's master file of receiving tickets. (Tr. 80, 95.) Respondent removed the copy of the receiving ticket attached to the appropriate grower's file after the fruit was packed and attached the copy of the receiving ticket to the record that shows the fruit was packed (Tr. 80).

8. Included among the kinds of fruit Respondent handles are two varieties of hybrid grapefruit known as Melogold and Oroblanco. These hybrid varieties of grapefruit were created at the University of California, Riverside, in 1958, by cross-breeding a grapefruit with a pummelo. Seven different varieties resulted; however, only Melogold and Oroblanco were chosen for further study and propagation. Both Melogold and Oroblanco were ultimately patented; Oroblanco in 1980 and Melogold in 1987. (CX 5; Tr. 30-39.)

9. Oroblanco and Melogold are closely related varieties of grapefruit; and thus, have a similar appearance. However, there are differences by which the two varieties can be distinguished from one another. These differences become more pronounced late in the growing season, as the grapefruit ripens. Melogold tends to be larger than Oroblanco and have a more pear-like shape than Oroblanco. The average peel thickness of Melogold, as a percentage of the diameter of the grapefruit, is thinner than Oroblanco and the juice percentage of Oroblanco is slightly lower than Melogold. Oroblanco is generally considered sweeter than Melogold; however, opinions vary as to which variety of grapefruit has the preferable taste. Early in the growing season both varieties of grapefruit are green, but, as they ripen, Melogold develops a yellowish, gold color, while Oroblanco turns an off-white, light green shade. (CX 5; Tr. 43-45, 218-19, 229, 312-13, 317-22, 504-06.)

10. Some Melogold have Oroblanco characteristics and vice versa. Even experts cannot always tell them apart. Timothy Williams, a staff research associate for the citrus breeding program at the University of California, Riverside, testified that in order to tell the difference, it is necessary to look at a large sample, such as 20 pieces of each variety of grapefruit. (Tr. 59.)

11. Mr. Nieblas, who at the time of the hearing was 43 years old, has been involved with growing citrus since he was a child. In the mid-1980's, Mr. Nieblas worked for an independent packer, Suntreat. Through the actions of Mr. Nieblas, Suntreat, working with California Citrus Specialties, became the first marketer of Oroblanco and Melogold in the San Joaquin Valley of California. Mr. Nieblas went to Japan on two

occasions between 1986 and 1990 to discuss oranges and Oroblanco and Melogold. (Tr. 367-76.)

12. Oroblanco and Melogold grown in California are generally picked and sold early in the growing season, beginning in October, while they are still green (Tr. 305-08, 380-82).

13. There is virtually no domestic market for Oroblanco or Melogold. Oroblanco and Melogold are primarily sold in Japan. The Israelis aggressively market Oroblanco, which they call "Sweeties," in Japan; and hence, Sweeties dominate the Japanese market. Sweeties set the standard for Oroblanco in Japan. As Sweeties are green and sweet, California hybrid grapefruit also must be green and sweet, if it is to be accepted in Japan. (Tr. 52, 379-82.)

14. Until 1995, Sweeties did not arrive in Japan from Israel until approximately December 14 because, after harvest in Israel, Sweeties had to be kept in cold storage for 14 days to kill fruit fly larvae before they were shipped to Japan (Tr. 382, 388). However, beginning in 1995, the Israelis began using a process whereby the Sweeties were subjected to cold storage during transportation from Israel to Japan; thereby enabling the Israelis to get the Sweeties to Japan approximately 2 weeks earlier than in previous years (Tr. 389).

15. Once Sweeties arrive in Japan, it is impossible to market Oroblanco and Melogold from California in Japan (Tr. 494). As a result of the domination of the Japanese grapefruit market by Sweeties, California Oroblanco and Melogold must be shipped to Japan before the Sweeties arrive. Until 1995, the period of time between

harvest of the California Oroblanco and Melogold and the time the Sweeties arrived in Japan was approximately 1 month (Tr. 382). In 1995, as a result of the Israelis subjecting the Sweeties to cold storage during transportation, the period between the harvest of the California Oroblanco and Melogold and the time the Sweeties arrived in Japan was reduced to approximately 2 weeks (Tr. 388-89).

16. In Japan, no distinction is made between California Oroblanco and Melogold, all California green grapefruit is sold together (Tr. 223, 301, 305-06, 382-83, 496-97). When grapefruit is displayed in Japanese stores, it is labeled according to origin; for example, Florida grapefruit, California grapefruit, or Israel Sweetie grapefruit (Tr. 300-01).

17. There was no price difference between California Melogold and Oroblanco shipped to Japan during the 1995 season (Tr. 325, 329).

Fresh Pacific Transaction

18. Milton and Elsie Lindner of Lemon Cove, California, owned 7 acres of Melogold trees and 5 acres of Oroblanco trees (Tr. 202). Only Melogold could be harvested from the Lindner's premises in 1995 because the Oroblanco trees had been planted in June 1995 and were not yet capable of producing grapefruit (Tr. 203).

19. Mr. Lindner arranged with Sequoia Enterprises, Inc., to sell the Lindner's Melogold during the 1995-1996 harvesting season (Tr. 209, 515-16). Mr. Lindner's primary contact at Sequoia Enterprises, Inc., was Oleah Wilson, one of the owners and officers of Sequoia Enterprises, Inc. (Tr. 89-90, 209, 513). Mr. Lindner informed Oleah Wilson that he (Mr. Lindner) only had Melogold. Marvin Wilson, Oleah Wilson's son

and president of Sequoia Enterprises, Inc., also knew that Mr. Lindner's crop consisted of only Melogold. (Tr. 89-90, 209.)

20. Fresh Pacific Fruit & Vegetable, Inc., is an export company that ships approximately 30 products to Asian markets. Fresh Pacific's business includes the export of green grapefruit to Japan. (Tr. 299-300.)

21. In October 1995, Jim Abbot, who runs the field department for Fresh Pacific Fruit & Vegetable, Inc., visited between 10 and 12 California citrus groves with a Japanese buyer who was looking for green grapefruit. They visited both Oroblanco and Melogold groves. The Japanese buyer was not concerned with the variety of the grapefruit, but was interested in the taste and juice quality. (Tr. 301-03, 306.) Among the groves that Mr. Abbott visited with the Japanese buyer and Oleah and Marvin Wilson was the Lindner's grove in Lemon Cove, California. The Japanese buyer chose to purchase Melogold from the Lindners. (Tr. 303-04, 519.)

22. Sequoia Enterprises, Inc., arranged to pick and pack Mr. Lindner's Melogold (Tr. 409-11). However, the Lindner's grapefruit was too large for Sequoia Enterprises, Inc.'s machines, and Respondent agreed to pack the Lindner's grapefruit (Tr. 516). On October 24, 1995, Sequoia Enterprises, Inc., picked the Lindner's Melogold and delivered it in three loads to Respondent (CX 2 at 1-6, 11, 13, 15).

23. Respondent completed three receiving tickets for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 10, 12, 14; Tr. 433-34).

24. Respondent prepared three picking reports for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 16-18; Tr. 97-99).

25. Respondent prepared three sorter reports for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 20-21, 24, 27; Tr. 100-03).

26. Respondent prepared daily shipment records on October 25, 27, and 31, 1995, reflecting repacking of the grapefruit received from the Lindner's grove. The daily shipment records dated October 25 and 31, 1995, each identify the Lindner's Melogold as Oroblanco. (CX 2 at 25, 26, 28; Tr. 104-06.) The daily shipment record dated October 27, 1995, identifies the grapefruit received from the Lindner's grove as Melogold (CX 2 at 25).

27. Respondent prepared a receiving book which states that the Melogold that it received from the Lindner's grove was Oroblanco (CX 2 at 29; Tr. 106-07).

28. Respondent packed the Lindner Melogold on October 25, 1995. The grapefruit was packed in Fresh Pacific Fruit & Vegetable, Inc.'s cartons bearing its "Super Sonic" logo. The cartons are labeled "California Citrus," and there are boxes on each carton which can be marked so as to identify the contents of the carton as either oranges, grapefruit, or lemons. (CX 2 at 18, RX 5; Tr. 311-12, 416-17.)

29. Sequoia Enterprises, Inc., issued an invoice to Fresh Pacific Fruit & Vegetable, Inc., dated October 31, 1995, for 1,092 cartons of Oroblanco. The invoice, which contains a reference to "PO #F61301," states that the grapefruit was shipped from

Terra Bella, California, on October 26, 1995, and shipped to General Fruit Co., Ltd., Tokyo, Japan. (CX 2 at 30-31.)

30. Respondent's file for Sequoia Enterprises, Inc., contained a document entitled "Packer Loading Instructions" issued by Fresh Pacific Fruit & Vegetable, Inc., to Sequoia Enterprises, Inc., which shows that 1,092 cartons of Oroblanco with the Super Sonic label were loaded for transport to General Fruit Co., Ltd., on October 25 and 26, 1995. The Packer Loading Instructions contain a reference to "Order No. F61301." (CX 2 at 32-33; Tr. 108-11.)

31. Fresh Pacific Fruit & Vegetable, Inc., prepared a document entitled "Truck Loading Instructions," which shows that Three Rivers was to transport 1,092 cartons of Oroblanco under the label Super Sonic from Terra Bella, California. The Truck Loading Instructions contains a reference to "Order F61301." (CX 2 at 34; Tr. 112.)

32. Fresh Pacific Fruit & Vegetable, Inc., prepared two documents entitled "Loading Confirmation," which show that 1,092 cartons of Oroblanco were loaded onto a ship on October 26, 1995 (CX 2 at 35, 38; Tr. 112-14). One of the Loading Confirmation documents contains a reference to "Order Number 961301" (CX 2 at 35); the other Loading Confirmation document refers to "Order Number F61301" (CX 2 at 38).

33. Fresh Pacific Fruit & Vegetable, Inc., prepared two commercial invoices which describe the fruit sold to General Fruit Co., Ltd., as 1,092 cartons of fresh Oroblanco under the Super Sonic label. Each invoice is identified with the number "F61301." (CX 2 at 36, 37; Tr. 113.)

34. Respondent's files contained a bill of lading prepared by Respondent which shows that 1,092 cartons of Oroblanco were shipped to General Fruit Co., Ltd., in Japan, on October 26, 1995. The bill of lading makes reference to "Order Number F61301." (CX 2 at 39-41; Tr. 114-16.)

35. Fresh Pacific Fruit & Vegetable, Inc., issued a check to Sequoia Enterprises, Inc., dated November 14, 1995, for $17,710.90. The check skirt makes reference to invoice number "6502/F61301-01" (CX 2 at 42; Tr. 116).

36. In response to an inquiry by Kloster, Ruddell, Hornsburg, Cochran, Stanton & Smith, a law firm representing Elsie Lindner, regarding the status of her 1995 grapefruit crop (CX 2 at 2), Sequoia Enterprises, Inc., sent a letter dated May 9, 1995, stating that 1,092 cartons of the Lindner's grapefruit had been sold for export for $17,710.90 (CX 2 at 4-6).

37. The Japanese buyers received the grapefruit they had personally selected and purchased prior to picking, packing, and shipment; and there is no evidence of any complaints about the grapefruit.

Umina Brothers Transaction

38. Umina Brothers, Inc., is an exporter of fresh fruit. Its export sales and distribution are handled by Mark Golden. Mr. Golden spends more than half of his time visiting growers and observing the products. He visits Japan approximately twice a year. (Tr. 483-84.)

39. In October 1995, Mr. Golden, along with a group of Japanese buyers, visited several California citrus groves. The Japanese buyers sampled green grapefruit

from various groves and selected the grapefruit they wanted to purchase. (Tr. 486.) The Japanese buyers were not interested in whether the grapefruit was Melogold or Oroblanco, but rather were concerned with taste and color (Tr. 488).

40. The Japanese buyers selected grapefruit from three groves belonging to John Corkins, F. Glenn McDonald, and Sierra Victor Ranch Company, respectively (CX 3a, CX 3b, CX 3c, CX 4a, CX 4b; Tr. 486). All of the grapefruit picked from Mr. Corkins' grove in 1995 was Melogold, and all of the grapefruit, except 1¼ bins of Oroblanco, picked from Mr. McDonald's grove in 1995 was Melogold (CX 3a; Tr. 216, 219, 228, 235). There was no testimony with respect to the variety of grapefruit picked at the Sierra Victor Ranch Company.[2]

41. Respondent picked Mr. Corkins' Melogold on November 1 and November 2, 1995, and transported three truck loads of Mr. Corkins' Melogold to Respondent's packing plant. Respondent completed three receiving tickets for Mr. Corkins' grapefruit, each of which identify Mr. Corkins' Melogold as Oroblanco. (CX 3a at 1-4; Tr. 118.)

42. Mr. Corkins received copies of Respondent's receiving tickets and informed Respondent that the receiving tickets erroneously described his (Mr. Corkins') grapefruit as Oroblanco, rather than Melogold. Mr. Corkins was informed by Mr. Nieblas or

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[2]An affidavit, which states that Respondent packed 4,880 cartons of Sierra Victor Ranch Company's Melogold and 29 cartons of Sierra Victor Ranch Company's Oroblanco, is in evidence (CX 3b at 1). However, there is nothing in the affidavit or elsewhere to indicate the affiant's relationship to the Sierra Victor Ranch Company or the source of the affiant's knowledge. The affiant did not testify, nor did the investigator who took the affidavit. As such, the affidavit is not reliable evidence, and no weight has been given to the affidavit.

"someone in his operation" that "they" meant to write Melogold on the receiving tickets. (Tr. 220-22.)

43. Respondent prepared two documents entitled "Daily Packout Record" for Mr. Corkins' grapefruit which identify the grapefruit as Melogold (CX 3a at 5-6; Tr. 118-19).

44. Respondent prepared a sorter report for Mr. Corkins' grapefruit which identifies the grapefruit as Melogold (CX 3a at 7-9; Tr. 119-20).

45. Respondent's receiving book states that the grapefruit that it received from the Mr. Corkins' grove was Oroblanco (CX 3a at 11; Tr. 121-22).

46. On October 31, 1995, and November 2, 1995, Respondent picked grapefruit from Sierra Victor Ranch Company. The truck bin count sheets identify Sierra Victor Ranch Company's grapefruit as Melogold. (CX 3b at 3, 5, CX 4a at 3, 5, 7.) Respondent completed five receiving tickets for the grapefruit received from Sierra Victor Ranch Company. Lot number 4030 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 3b at 2), lot number 4031 from Sierra Victor Ranch Company is identified as 18½ bins of Melogold (CX 3b at 4), lot number 4015 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 4a at 2), lot number 4019 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 4a at 4), and lot number 4023 from Sierra Victor Ranch Company is identified as 24½ bins of Melogold (CX 4a at 6).

47. Respondent prepared three documents entitled "Daily Packout Record" for Sierra Victor Ranch Company's grapefruit which identify Sierra Victor Ranch Company's grapefruit as Melogold (CX 3b at 6-7, 16, CX 4a at 8-9; Tr. 130, 145-47).

48. Respondent prepared sorter reports which identify Sierra Victor Ranch Company's grapefruit as Oroblanco (CX 3b at 9-10, CX 4a at 12, 15-16; Tr. 132-33, 149).

49. Respondent's receiving book states that lot numbers 4015, 4019, 4023, 4030, and 4031, which Respondent received from the Sierra Victor Ranch Company's grove, were Melogold (CX 3b at 17, CX 3c at 6, CX 4a at 18; Tr. 137, 151-52).

50. Mr. McDonald owned 6 acres of Melogold trees and 4 Oroblanco trees (Tr. 228).

51. On October 26, 1995, Respondent picked Mr. McDonald's grapefruit and transported the grapefruit to Respondent's packing house (Tr. 230-31). When the grapefruit arrived at the packing house, Respondent prepared two receiving tickets. The receiving ticket for lot number 4004 describes the grapefruit received from Mr. McDonald as 50½ bins of Melogold (CX 3c at 2; Tr. 139-40). The receiving ticket for lot number 4006 initially described the grapefruit received from Mr. McDonald as 1¼ bins of Melogold, but a line is drawn through the word "Melogold" and the word "Oroblanco" is written above the word "Melogold" (CX 3c at 1; Tr. 139-40).

52. Respondent prepared a document entitled "Daily Packout Record" for Mr. McDonald's grapefruit which identifies the grapefruit as Melogold (CX 3c at 3, CX 4b at 3; Tr. 140, 157). The Daily Packout Record contains a reference to "1007" next to

a reference to 174 cartons of size 32 grapefruit and 42 cartons of size 40 grapefruit (CX 3c at 3).

53. Respondent prepared a document entitled "Daily Shipment Record" for Mr. McDonald's grapefruit which identifies the grapefruit as Melogold (CX 3c at 4; Tr. 141).

54. Respondent prepared a sorter report which identifies Mr. McDonald's grapefruit as Oroblanco (CX 3c at 5; Tr. 142).

55. Respondent's receiving book states that lot numbers 4004 and 4006, which Respondent received from the Mr. McDonald, were Oroblanco (CX 3c at 6; Tr. 142). With respect to lot number 4004, there is a line drawn through the word "Melogolds" and "oro's" is written above the word "Melogolds" (CX 3c at 6).

56. Respondent issued an invoice (invoice number 1007) to Umina Brothers, Inc., dated November 14, 1995, for 1,176 cartons of Oroblanco shipped from Respondent to Tamagawa Trading Company, Inc., in Japan (CX 3a at 12, CX 3b at 18, CX 3c at 7).

57. Respondent prepared a bill of lading (bill of lading number 1007) which shows that 1,176 cartons of Oroblanco were shipped to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10; Tr. 139). The bill of lading states that the total charge for the 1,176 cartons of grapefruit is $14,492.45 (CX 3a at 15, CX 3b 21, CX 3c at 10). Respondent deposited a check from Umina Brothers, Inc., on December 4, 1995, in the amount of $14,492.45 (CX 3a at 16, CX 3b at 22, CX 3c at 11).

58. The number 1007 on the invoice (CX 3a at 12, CX 3b at 18, CX 3c at 7) and the bill of lading (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10) is also used on Respondent's Daily Packout Record for 295 cartons of Mr. Corkins' Melogold (CX 3a at 5), Respondent's Daily Packout Record for 115 cartons of Sierra Victor Ranch Company's Melogold (CX 3b at 6), and Respondent's Daily Packout Record for 216 cartons of Mr. McDonald's Melogold (CX 3c at 3).

59. Heritage Produce Sales, Inc., issued an invoice (invoice number HP952465) to Umina Brothers, Inc., dated November 14, 1995, for 1,176 cartons of Oroblanco shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 19, CX 4b at 7; Tr. 152-53).

60. Respondent prepared a bill of lading (bill of lading number 1008) for customer number HP952465, which shows that 1,176 cartons of Oroblanco were shipped to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 21, CX 4b at 9; Tr. 154).

61. The number 1008 on the bill of lading (CX 4a at 21, CX 4b at 9) and the number 952465, which appears on the invoice (CX 4a at 19, CX 4b at 7), are also used on Respondent's Daily Packout Record for 328 cartons of Sierra Victor Ranch Company's Melogold (CX 4a at 8), and the Daily Packout Record for 273 cartons of Mr. McDonald's Melogold (CX 4b at 3).

62. Heritage Produce Sales, Inc., issued a shipping document dated November 3, 1995, which states that 1,176 cartons of Oroblanco were sold to Umina Brothers, Inc., and shipped to Tamagawa Trading Company, Inc., in Japan. The shipping

document contains a reference to HP952465 (CX 4a at 22-23, CX 4b at 10-11; Tr. 155-56).

63. All of the grapefruit was packed in cartons Respondent purchased from Sequoia Enterprises, Inc. The cartons identified the contents as "Sequoia Grapefruit" (RX 6). Mr. Golden was present while the grapefruit was packed. He inspected and approved all of the grapefruit and placed his stickers on the pallets. (Tr. 418-20, 492-93.)

64. The Japanese buyers received the grapefruit they personally selected and purchased prior to shipment. The buyers appear to have been happy with the grapefruit, as they did not complain about the grapefruit and continued to do business with Umina Brothers, Inc. (Tr. 488-89.)

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of a perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

3. Respondent willfully and repeatedly failed to keep such records as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i).

Discussion

Complainant alleges that Respondent willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) by

misrepresenting the variety of grapefruit sold to two Japanese buyers as Oroblanco, when the variety was actually Melogold, and by failing to keep accounts, records, and memoranda that fully and correctly disclosed all of the transactions involved in Respondent's business. Complainant does not dispute the fact that the cartons correctly identified the produce as "grapefruit." Respondent admits that its records contained errors with respect to the variety of the grapefruit described. The only question, therefore, is whether those errors constitute violations of the PACA.

Section 2(4) of the PACA

Complainant proved by a preponderance of the evidence that Respondent made false or misleading statements in connection with transactions involving a perishable agricultural commodity by describing Melogold grapefruit as Oroblanco grapefruit on three bills of lading and one invoice in connection with the transactions.[3] However, the

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[3]See: (1) the bill of lading (CX 2 at 39-41; Tr. 114-16), prepared by Respondent, which states that 1,092 cartons of Oroblanco were shipped to General Fruit Co., Ltd., in Japan, on October 26, 1995, when, in fact, the 1,092 cartons of grapefruit to which the bill of lading makes reference were Melogold from the Lindner's grove; (2) invoice number 1007, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 4, 1995 (CX 3a at 12, CX 3b at 18, CX 3c at 7; Tr. 137-38), when, in fact, the 1,176 cartons of grapefruit included 295 cartons of Melogold from Mr. Corkins' grove, 216 cartons of Melogold from Mr. McDonald's grove, and 115 cartons of Melogold from Sierra Victor Ranch Company's grove; (3) bill of lading number 1007, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10; Tr. 139), when, in fact, the 1,176 cartons of grapefruit included 295 cartons of Melogold from Mr. Corkins' grove, 216 cartons of Melogold from Mr. McDonald's grove, and 115 cartons of Melogold from Sierra Victor Ranch Company's grove; and (4) bill of lading number 1008, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 21, CX 4b

(continued...)

record is not sufficient to find, or to infer, that Respondent made the false or misleading statements for a fraudulent purpose. Complainant states that:

> Respondent was desperate to send as much hybrid grapefruit to Japan as possible before the arrival of the Israeli Sweeties. Respondent knew that the Japanese preferred Oroblanco to Melogold. Therefore, in order to ensure that the Japanese would accept the Melogold, respondent misrepresented it as Oroblanco.

Complainant's Proposed Findings of Fact, Conclusions and Order at 31-32. The record, however, does not support this theory.

There was no need to ensure that the Japanese would accept the grapefruit since it had already been sold. The Melogold in question were visually inspected, tasted, and selected by the Japanese buyers and purchased prior to packing or shipment. Therefore, there is no apparent fraudulent purpose for Respondent's false or misleading statements regarding the variety of the grapefruit.

In addition, the uncontroverted testimony with respect to the Japanese market indicates that, as between Melogold and Oroblanco, the Japanese did not have a preference for Oroblanco and, in fact, did not even distinguish between the two. Complainant asserts that Japanese preference for the Israeli Sweetie proves a preference for Oroblanco in general. There was testimony, however, that Israel has better growing conditions for grapefruit than the United States, enabling Israelis to produce higher quality grapefruit (Tr. 330-31). Also Israel reached the Japanese market first,

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[3](...continued)
at 9; Tr. 154), when, in fact, the 1,176 cartons of grapefruit included 273 cartons of Melogold from Mr. McDonald's grove and 328 cartons of Melogold from Sierra Victor Ranch Company's grove.

aggressively marketing its fruit with the name Sweetie (Tr. 52-53). Furthermore, the Japanese prefer the Sweetie to all California green grapefruit, including Oroblanco. Therefore, it appears to be name recognition and superior quality which account for the preference, not any special affinity for Oroblanco.

Finally, Respondent did not have any financial incentive to misrepresent the Melogold as Oroblanco since Respondent did not receive a commission, but rather was paid by the carton regardless of which variety of the grapefruit Respondent packed. Complainant asserts that Respondent did receive a commission and cites as proof the fact that Respondent issued accounts of sale to Mr. Corkins and Mr. McDonald (CX 10, CX 11). The documents account for all costs, including the "selling charge" to be paid to Heritage Produce Sales, Inc. Respondent's explanation that it agreed to handle the paperwork on small growers because Heritage Produce Sales, Inc., did not want to be bothered for such small amounts of acreage and that Respondent was merely collecting sales charges for Heritage Produce Sales, Inc., is credible (Tr. 478-79).

Complainant further states that it would be ludicrous to find that Respondent was not paid on a commission basis, as Respondent could not otherwise have earned a profit (Complainant's Reply Brief at 6). To the contrary, there is no reason to believe that Respondent would not make a profit by charging only for its packing services and allowing outside sales firms to handle the marketing and receive the sales commission.

Finally, even if Respondent had received a commission, prices were the same for all green grapefruit; thus, eliminating any monetary incentive for misrepresenting the Melogold as Oroblanco.

Complainant failed to prove by a preponderance of the evidence that Respondent's false or misleading statements regarding the variety of the grapefruit in question were made for a fraudulent purpose, and the record does not establish facts upon which I can base an inference that Respondent's false or misleading statements were made for a fraudulent purpose. Therefore, I do not find that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint.

Section 2(5) of the PACA

Complainant proved by a preponderance of the evidence that Respondent misrepresented, by word or statement, the character or kind of grapefruit on three bills of lading and one invoice.[4] Specifically, Respondent stated on three bills of lading and one invoice that the grapefruit referenced on each of these documents was Oroblanco, when, in fact, the grapefruit was Melogold.

As originally enacted, section 2(5) of the PACA required that, in order to prove a violation of section 2(5) of the PACA, the misrepresentation had to have been made for a fraudulent purpose.[5] Section 2(5) of the PACA (7 U.S.C. § 499b(5)) has been

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[4]See note 3.

[5]Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 2(5), 46 Stat. 532-33, provides:

> Sec. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .
>
> (5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to represent by word, act, or deed that any perishable

(continued...)

amended numerous times,[6] and the requirement that the misrepresentation be shown to have been made for a fraudulent purpose was deleted from section 2(5) of the PACA (7 U.S.C. § 499b(5)) in 1956.[7] The Senate Report and House of Representatives Report accompanying H.R. 5337, the bill that was enacted in 1956 and amended section 2(5) of the PACA to eliminate the fraudulent purpose requirement, describe the reason for deleting the fraudulent purpose requirement, as follows:

> Section 2(5) of the Perishable Agricultural Act—as it would be amended by H.R. 5337—would, by deleting the words "for a fraudulent purpose," dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act; evidence of bona fide misrepresentation relative to grade, quality, etc., would represent an adequate base for the declaration of illegal conduct.

S. Rep. No. 84-2507 at 4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3702; H.R. Rep. No. 84-1196 at 3 (1955).

Further, USDA's views regarding the elimination of the words *for a fraudulent purpose* from section 2(5) of the PACA were incorporated into the Senate Report and the House Report, as follows:

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[5](...continued)
agricultural commodity received in interstate or foreign commerce was produced in a State or in a country other than the State or country in which such commodity was actually produced[.]

[6]Act of Aug. 20, 1937, Pub. L. No. 328, ch. 719, § 2, 50 Stat. 725, 726; Act of June 29, 1940, Pub. L. No. 680, ch. 456, § 4, 54 Stat. 696; Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726; Act of Aug. 10, 1974, Pub. L. No. 93-369, 88 Stat. 423; Act of Oct. 18, 1982, Pub. L. No. 97-352, § 1, 96 Stat. 1667; Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 10, 109 Stat. 430.

[7]Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726.

DEPARTMENTAL VIEWS

Following is the letter from the Department of Agriculture recommending enactment of the bill with certain amendments. The amendments proposed by the Department were adopted.

May 25, 1955.

HON. HAROLD D. COOLEY,
Chairman, Committee on Agriculture,
House of Representatives.

DEAR CONGRESSMAN COOLEY: This is in reply to your letter of April 20, 1955, requesting a report on H.R. 5337, a bill to amend the provisions of the Perishable Agricultural Commodities Act of 1930 relating to practices in the marketing of perishable agricultural commodities.

. . . .

Growers, shippers, and buyers are concerned about the existing extent of misbranding and misrepresentation of grade and origin of fresh fruits and vegetables. Although the proposed amendments to the Perishable Agricultural Commodities Act would not correct all malpractices in this field, they would provide significant help. Effective control of misbranding and misrepresentation of fruits and vegetables is difficult under the present statute because no authority is granted to inspect produce in the possession or control of a licensee to determine if it is misbranded unless the licensee requests or grants permission for such inspection. Also, substantial evidence must be produced that the misbranding was done deliberately with the definite intention of defrauding the buyer in order to prove that a fraudulent purpose is involved. The proposed amendments undoubtedly would expedite enforcement of the misbranding provisions of the act and provide for more effective action against licensees who violate these provisions.

. . . .

Sincerely yours,

TRUE D. MORSE,
Acting Secretary.

S. Rep. No. 84-2507 at 5-7 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3703-04; H.R. Rep. No. 84-1196 at 3-5 (1955).

During congressional hearings on H.R. 5337, held on May 26 and May 27, 1955, G.R. Grange, the Deputy Director of the Fruit and Vegetable Division, Agricultural Marketing Service, USDA, testified that the elimination of the *fraudulent purpose provision* would obviate the need to show that the alleged violator intended to mislead the produce buyer and would enable USDA to prove a misbranding violation, even if the buyer knew of, and did not object to, the misbranding, as follows:

> MR. GRANGE. . . .
>
> I have a rather brief prepared statement on the bill that has the indorsement of the Department of Agriculture, and with your permission I would like to read it.
>
> MR. GRANT. Yes, you may proceed, sir.
>
> MR. GRANGE. . . .
>
> . . . .
>
> One major purpose of the bill is to strengthen the provisions regarding misbranding or misrepresentation of grade and origin of fresh fruits and vegetables. This objective is accomplished by eliminating the necessity to prove fraudulent purpose for such actions and by authorizing the Secretary or his representatives to inspect produce held by licensees to determine if any misbranding or misrepresentation exists. Proving that a fraudulent purpose is involved in a misbranding case means that substantial evidence must be obtained to show the intent of the person committing the violation. On a practicable basis such evidence is usually exceedingly difficult to obtain because the person involved generally pleads that he acted in good faith and that the misbranding or misrepresentation was unintentional. Also, we have encountered the situation a number of times where the shipper or repacker has misbranded the produce as to grade or origin but claims that he was not defrauding the buyer since the latter knew of, and did not object to, the misbranding.
>
> . . . .
>
> The foregoing statement outlines briefly the Department's recommendations for passage of this legislation and gives its interpretation

> of some of the major factors which would be involved in carrying out the provisions of these amendments.
>
> That, gentlemen is a brief summary of the Department's viewpoint on these bills. We will be glad to give such further information or to answer such questions as you may have.
>
> . . . .
>
> MR. GRANT. . . .
>
> . . . does not this [bill] in a way preclude legal action until the Department has failed to get the interested parties together?
>
> . . . .
>
> MR. GRANGE. My understanding of the misbranding provisions, referring solely to them, is that misbranding per se would be a violation of the PAC Act.
>
> Of [sic] the moment with the necessity of proving fraudulent purpose we have to contact the second party concerned to determine how it was represented to him, did he buy it at that lower price, and was there actually an action on the part of the person doing the misbranding that would give us grounds to find that a fraudulent purpose was involved.
>
> If it were no longer necessary to obtain evidence concerning the intent of the individual doing this misbranding, in my opinion then it would to a large extent remove the necessity of having to dig into the relationship between the two parties concerned.

Marketing of Perishable Agricultural Commodities: Hearings on H.R. 5337 and H.R. 5818 Before the Subcomm. on Domestic Marketing of the House Comm. on Agriculture, 84th Cong., 1st Sess. 6-8, 10 (1955) (statement of G.R. Grange, Deputy Director, Fruit and Vegetable Division, AMS, USDA).

The legislative history applicable to the Act of July 30, 1956, is discussed at great length in *In re Harrisburg Daily Market, Inc.*, 20 Agric. Dec. 955 (1961), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963), as follows:

Respondents contend that the proscribed act of misrepresenting must be willful or intentional. It is recognized that a licensee making an untrue representation may not possess guilty knowledge of wrongful intent. For example, a false or untrue representation may be made innocently, negligently, knowingly and intentionally or for a fraudulent purpose. Cf. *e.g., Jones v. United States*, 207 F.2d 563, 564 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954); *National Mfg. Co. v. United States*, 210 F.2d 263, 275-76 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954); *United States v. Jerome*, 115 F.Supp. 818, 822 (S.D.N.Y. 1953). See also, *e.g.*, Prosser on Torts § 87 (1941); Black's Law Dictionary (4th ed. 1951). Yet, no qualifications were legislated in section 2(5) with respect to the degree of knowledge or the intent of the commission merchant, dealer, or broker making a misrepresentation otherwise prohibited thereunder. Such omission is especially significant as the Congress, in the enactment of Public Law 842, was directly concerned with the question of the mental element required to constitute a violation of section 2(5). The purpose of the 1956 amendment was, in part, to eliminate the phrase, "for a fraudulent purpose" and, of necessity, the Congress was confronted with the effect of such delegation and the degree of culpability to be required in its stead. In interpreting section 2(5) of the act we are precluded from inserting words, such as "willfully" or "knowingly," which are not in the statute. *United States v. Great Northern Railway Co.*, 343 U.S. 562, 575 (1952); *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). It appears, therefore, that Congress did not intend to so qualify a misrepresentation defined in section 2(5) and that the act of misrepresenting by the means specified therein in connection with the subject matter there described constitutes a violation of such section irrespective of the intent of the licensee to misrepresent or even knowledge that the representation is untrue. . . .

This conclusion is clearly affirmed by examination of the legislative history of the 1956 amendment to section 2(5). Prior to such amendment and the elimination of the phrase "for a fraudulent purpose" it was necessary in order to find a violation of section 2(5) to present substantial evidence "that the misbranding was done deliberately with the definite intention of defrauding the buyer." H.R. Rep. No. 1196, 84th Cong., 1st Sess. 4 (1955). See *e.g., In re Flaten-Meberg*, 14 [Agric. Dec.] 952 (1955). It was the declared purpose, in part, of the amendment in issue to "dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act" and to substitute therefor merely "evidence of bona fide misrepresentations relative to grade, quality, etc.," as an "adequate base for the declaration of illegal conduct." H.R. Rep. No. 1196, *supra*, at p. 3. See also S. Rep. No. 2507, 84th Cong. 2d Sess. 4 (1956). The committees obviously did not use the term "bona fide" in its literal sense. Otherwise, they would be saying

> that a good faith misrepresentation would be illegal conduct. They evidently used the term in the sense of real, actual, material, or a matter of substance. Cf. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 384-85 (1935); *Middle Tennessee Electric Membership Corp. v. State ex rel. Adams*, 246 S.W.2d 958, 959-60 (Tenn. 1952). As thus construed, a "bona fide misrepresentation" consists of an actual representation of a material fact which representation is false.
>
> That all subjective mental elements were removed from section 2(5) of the act is further apparent from the congressional hearings on the then proposed amendment. *Hearings before the Subcommittee on Domestic Marketing of the House Committee on Agriculture*, 84th Cong., 1st Sess. on H.R. 5337 and H.R. 5818 (1955). The principal witness and proponent of the bill so understood the effect and consequences of the change, as did other witnesses at the hearings. *Hearings, supra*, at pp. 10, 22, and 39. In addition, the reintroduction of the requirement of knowledge or intent into section 2(5) was proposed and considered. *Hearings, supra*, at pp. 19-20. It was not adopted. . . .
>
> . . . .
>
> . . . [C]ulpability does not depend on the licensee's lack of good faith or whether or not the misrepresentations were made intentionally, deliberately, or accidentally.

In re Harrisburg Daily Market, Inc., supra, 20 Agric. Dec. at 969-73 (footnotes omitted).

The United States Court of Appeals for the District of Columbia Circuit, in affirming the *Harrisburg* decision, stated, as follows:

> The Perishable Agricultural Commodities Act, 1930, required proof of fraudulent purpose as an element of the misrepresentation violations. 46 Stat. 533 (1930). To achieve stricter enforcement as the legislative history discloses, the act was amended in 1956 to eliminate the need to show the existence of fraudulent purpose. 70 Stat. 726 (1956), 7 U.S.C.A. § 499b(5). See H.R. Rep. No. 1196, 84th Cong., 1st Sess., 3-4; S. Rep. No. 2507, 84th Cong., 2d Sess. 4,6, U.S. Code Cong. & Adm. News 1956, p. 3699. See also, *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606 (3d Cir. 1960).

Harrisburg Daily Market, Inc. v. Freeman, 309 F.2d 646, 647 (D.C. Cir. 1962) (per curiam), *cert. denied*, 372 U.S. 976 (1963).

The legislative history applicable to the Act of July 30, 1956, makes clear that any representation of the subject matter described in section 2(5) of the PACA, which is false, even if the misrepresentation is unintentional or accidental, constitutes a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). Proof of a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)) is not dependent on a showing: (1) that the commission merchant, dealer, or broker defrauded, or intended to defraud, the recipient or buyer of the misrepresented produce; (2) that the commission merchant, dealer, or broker intended to benefit by the misrepresentation; (3) that the commission merchant, dealer, or broker knew or believed that the recipient or buyer of the produce would rely on the misrepresentation; (4) that the recipient or buyer of the misrepresented produce relied on, or was injured by, the misrepresentation; or (5) that the recipient or buyer of the misrepresented produce was aware of the misrepresented fact.[8]

The record clearly establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

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[8]*See In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1564 (1981) (stating that respondent's contention that it did not intend to violate section 2(5) of the PACA is probably true; however, intent to defraud is irrelevant), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Robert J. Wilkinson*, 36 Agric. Dec. 454, 455-56 (1977) (stating that respondent's contention that he violated section 2(5) of the PACA, but that it was not a knowing violation, is not a defense); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 797 (1975) (stating that the record supports respondent's view that its violations of section 2(5) of the PACA were unintentional, but intent is not an element of the violations), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Harrisburg Daily Market, Inc.*, 20 Agric. Dec. 955, 973 (1961) (stating that culpability for a violation of section 2(5) of the PACA does not depend on lack of good faith or whether or not the misrepresentations were made intentionally, deliberately, or accidentally), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

Section 9 of the PACA

Numerous records kept by Respondent pertaining to the Melogold, which was shipped to General Fruit Co., Ltd., and to Tamagawa Trading Company, Inc., in Japan, incorrectly refer to the grapefruit as Oroblanco.[9] Respondent does not deny that its records were incorrect, and Mr. Nieblas admits that he did not pay close attention to the

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[9]See for example: (1) three receiving tickets completed by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 10, 12, 14); (2) three picking reports prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 16-18); (3) three sorter reports prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 20-21, 24, 27); (4) two daily shipment records prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 25-26, 28); (5) a receiving book prepared by Respondent which states that the Melogold received from the Lindner's grove was Oroblanco (CX 2 at 29); (6) packer loading instructions issued by Fresh Pacific Fruit & Vegetable, Inc., and kept by Respondent, which describe the Lindner's Melogold as Oroblanco (CX 2 at 32-33); (7) a bill of lading prepared by Respondent which describes the Lindner's Melogold as Oroblanco (CX 2 at 39-41); (8) three receiving tickets completed by Respondent for grapefruit received from Mr. Corkins' grove, each of which identify Mr. Corkins' Melogold as Oroblanco (CX 3a at 1-4); (9) a receiving book prepared by Respondent which states that the Melogold received from Mr. Corkins' grove was Oroblanco (CX 3a at 11); (10) sorter reports prepared by Respondent for grapefruit from Sierra Victor Ranch Company's grove which identify Sierra Victor Ranch Company's Melogold as Oroblanco (CX 3b at 9-10, CX 4a at 12, 15-16); (11) a sorter report prepared by Respondent for grapefruit from Mr. McDonald's grove which identifies Mr. McDonald's Melogold as Oroblanco (CX 3c at 5); (12) a receiving book prepared by Respondent which states that the Melogold received from Mr. Corkins' grove was Oroblanco (CX 3c at 6); (13) bill of lading number 1007, prepared by Respondent, which describes Mr. McDonald's, Mr. Corkins', and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10); (14) invoice number 1007, issued by Respondent, which describes Mr. McDonald's, Mr. Corkins', and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 3a at 12, CX 3b at 18, CX 3c at 7); and (15) bill of lading number 1008, prepared by Respondent, which describes Mr. McDonald's and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 4a at 21, CX 4b at 9).

varieties of grapefruit that were recorded on Respondent's records since the specific variety of the green grapefruit was not relevant to the transactions (Tr. 435-38).

There is no evidence that the errors in Respondent's internal records had the purpose or effect of deceiving anyone. The PACA, however, requires that records fully and correctly disclose all transactions, regardless of any deceptive intent or lack thereof. Therefore, I find that Respondent willfully and repeatedly failed to keep such records as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i), as alleged in the Complaint.

Sanctions

Respondent's violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499(b)(5), 499i) were willful and repeated as a matter of law.

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[10] Willfulness is reflected by Respondent's

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[10]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 17 (Aug. 18, 1998); *In re Queen City Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 19 (May 13, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 34 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1905-06 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880,

(continued...)

violations of express requirements of the PACA (7 U.S.C. §§ 499b(5), 499i) and the number of Respondent's violations. Respondent knew, or should have known, that the grapefruit in question was the Melogold variety. Mr. Nieblas, Respondent's founder, president, co-owner, and general manager, has had a great deal of experience with Melogold and Oroblanco and admitted that he did not pay close attention to the descriptions of the grapefruit that were recorded on Respondent's documents (Tr. 367-76, 435-38). Moreover, one of Respondent's growers, Mr. Corkins, brought to

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[10](...continued)
895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

Respondent's attention that the receiving tickets Respondent prepared for Mr. Corkins' grapefruit erroneously identified Mr. Corkins' grapefruit as Oroblanco (Tr. 220-22). Nonetheless, Respondent represented at least 2,319 cartons of Melogold as Oroblanco[11] and kept numerous records[12] that did not correctly disclose the transactions involved in Respondent's business.

Respondent's violations were also repeated. Respondent's violations are "repeated" because repeated means more than one. Respondent misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit. Each misrepresented carton constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).[13] Respondent also kept numerous records which did not fully and correctly disclose all transactions involved in its business. Each inaccurate record constitutes a separate violation of section 9 of the PACA (7 U.S.C. § 499i).

Complainant recommends a 90-day suspension of Respondent's PACA license or, in lieu of a 90-day suspension, a $115,000 civil penalty. This case is governed by USDA's sanction policy in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides:

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[11]See note 3.

[12]See note 9.

[13]*In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 35-36 (Aug. 18, 1998); *In re Potato Sales Co.*, 54 Agric. Dec. 1382, 1404 (1995), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[14] I have not adopted the sanction recommendation of administrative officials because their sanction recommendation is based, in part, on the allegation that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and, as explained in this Decision and Order, *supra*, I do not find that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Further, while Respondent's violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499b(5), 499i) were willful in the sense that Respondent exhibited a careless

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[14]*In re Marilyn Shepherd*, 57 Agric. Dec. ___, slip op. at 53-54 (June 26, 1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Mar. 30, 1998); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 61-62 (Mar. 20, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 62-63 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

disregard of statutory requirements, I do not find that Respondent engaged in the violations in order to deceive its customers. Rather, the violations appear to have been the result of Respondent's lack of concern for distinguishing between Oroblanco grapefruit and Melogold grapefruit. Moreover, Respondent has implemented a new system to ensure that the variety of grapefruit handled by Respondent is correctly recorded on its documents in future transactions. (Tr. 415, 418-22.) Nonetheless, Respondent's violations were willful and repeated, involving at least 2,319 cartons of grapefruit and numerous incorrect records, and Respondent's violations put at risk the integrity of exports of products from the United States (Tr. 258-59).

Section 8 of the PACA provides that, if the Secretary determines that a commission merchant, dealer, or broker has violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary may publish the facts and circumstances of the violation, suspend or revoke the license of the offender, or assess a civil penalty, as follows:

> **§ 499h. Grounds for suspension or revocation of license**
>
> **(a) Authority of Secretary**
>
> Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.
>
> . . . .
>
> **(e) Alternative civil penalties**
>
> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a

> commission merchant, dealer, or broker has violated section 499b of this title . . ., the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation.

7 U.S.C. § 499h(a), (e) (1994 & Supp. II 1996).

No civil penalty may be assessed for a violation of section 9 of the PACA; however, section 9 does provide that the Secretary may publish the facts and circumstances of the violation or suspend the license of the offender for a period not to exceed 90 days (7 U.S.C. § 499i).

Based on the record, I find that a 20-day suspension of Respondent's PACA license (15 days for Respondent's violations of section 2(5) of the PACA and 5 days for Respondent's violations of section 9 of the PACA) would have a deterrent effect on Respondent and others in the perishable agricultural commodities industry.

Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. II 1996)) provides that I may assess a civil penalty in lieu of the suspension of Respondent's license for its violations of section 2(5) of the PACA. In assessing the amount of the civil penalty, due consideration must be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. The seriousness, nature, and amount of Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) are discussed in this Decision and Order, *supra*. Respondent has between 30 and 35 employees (Tr. 296). Respondent operates a large business, and the record establishes that each day that Respondent's license is suspended would cost Respondent approximately $1,300 (Tr. 264-67). Based on these factors, I find that the assessment of

a $19,500 civil penalty for Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)), in lieu of the 15-day suspension of Respondent's PACA license for Respondent's violations of section 2(5) of the PACA, would be appropriate.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent's PACA license is suspended for a period of 5 days and Respondent is assessed a civil penalty of $19,500, which shall be paid by certified check or money order made payable to the "Treasurer of the United States" and forwarded to: James Frazier, United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch, Room 2095 South Building, 1400 Independence Avenue, SW, Washington, D.C. 20250. The certified check or money order shall be received by Mr. Frazier within 60 days after service of this Order on Respondent, and Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. 97-0004. The 5-day suspension of Respondent's PACA license shall take effect beginning on the 61st day after service of this Order on Respondent.

2. In the event that the PACA Branch does not receive a certified check or money order in accordance with paragraph 1 of this Order, Respondent's PACA license is suspended for 20 days, and the 20-day suspension shall take effect beginning on the 62nd day after service of this Order on Respondent.

Done at Washington, D.C.

September 30, 1998

William G. Jenson
Judicial Officer